Dr Noor Aini bt Hj Sa'ari v Sa-Art Sae-Lee (also known as Sa-Art Phuakthim) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1093 OF 2011
LOW HOP BING, KN SEGARA JJCA AND ANANTHAM KASINATHER J
27 JULY 2011

Civil Procedure — Discovery — Privilege — Respondent agreed to appellant's request to be examined by medical specialist — Appellant agreed to give respondents copy of specialist's report — Substantial parts of report served on respondents covered up — Whether appellant could claim privilege over covered parts — Whether privilege waived

The respondents sued the appellant in the High Court for negligently failing to take proper care of the first respondent during her pregnancy which caused her to lose one of her twins before childbirth and the other, the second respondent, to be born deformed. Following the filing of the suit, the appellant sought the first respondent's consent to have the second respondent examined by a consultant pediatrician 'for the purpose of assessing the second respondent's current condition and prognosis'. The respondents agreed to the request on condition, inter alia, the appellant's solicitors undertook to furnish the respondents' solicitors with a copy of the consultant's report ('report'). The appellant's solicitors agreed to the condition subject to the respondents' solicitors making available to them any specialist's report produced at their instance. The consultant pediatrician examined the second respondent and produced her report, a copy of which the appellant's solicitors only released to the respondents' solicitors after several months of delay with substantial parts of it covered up. They took the view the respondents were not entitled to have sight of the whole report because it included matters that went beyond 'the condition and prognosis of the second respondent'. The High Court allowed the respondents' application for the report to be made available to them in full without cover up. In the appeal against that decision to the Court of Appeal, the appellant argued she was entitled to have parts of the report covered up on the ground of privilege since it was prepared in view of pending litigation between the parties.

Held, dismissing the appeal with costs:

(1) The appellant was obliged, pursuant to her agreement with the respondents, to make discovery of the consultant's report in its uncensored state. She was estopped from refusing to make discovery

since she, through her solicitors, agreed to provide the report subject to two conditions and both conditions were complied with by the respondents (see para 9).

(2) In consideration of the respondents making the second respondent available for examination by the appellant's consultant, the appellant agreed to waive the privilege she would otherwise have enjoyed with regard to the report. If the appellant feared the risk of the consultant producing a report that exceeded her mandate, she should have required the consultant to produce more than one report (see para 18).

(3) Since the consultant only produced one report, it was reasonable for the court, and the respondents, to conclude that it only dealt with the condition and prognosis of the second respondent. There was no affidavit from the consultant to suggest otherwise; nor was there anything in the report to suggest the covered parts did not relate to the condition and prognosis of the second respondent (see paras 8 & 18).

(4) It was reasonable for the court to infer that even if the report dealt with matters other than the condition and prognosis of the second respondent, it was probably because such matters were considered necessary for inclusion by the consultant (see para 18).

(5) The court could not accept that a consultant employed by the appellant would go out of her way to produce a report beyond her mandate unless she considered the report as a whole to be necessary for the court to understand the condition and prognosis of the second respondent bearing in mind the report was prepared when litigation was already pending (see para 18).

[Bahasa Malaysia summary

Responden-responden telah menyaman perayu di Mahkamah Tinggi kerana dengan cuai telah gagal menjaga sewajarnya responden pertama semasa dia mengandung sehingga menyebabkan kehilangan salah seorang daripada anak kembarnya sebelum dapat dilahirkan dan yang seorang lagi, responden kedua, dilahirkan cacat. Berikutan pemfailan guaman, perayu memohon persetujuan responden pertama agar responden kedua diperiksa oleh pakar pediatrik 'for the purpose of assessing the second respondent's current condition and prognosis'. Responden-responden bersetuju terhadap permintaan itu dengan syarat, antara lain, peguamcara perayu mengakujanji untuk memberikan peguamcara responden-responden sesalinan laporan konsultan itu ('laporan'). Peguamcara perayu bersetuju dengan syarat itu tertakluk kepada peguamcara responden-responden menyediakan kepada mereka apa-apa laporan pakar yang dikemukakan atas permintaan mereka. Pakar pediatrik itu telah memeriksa responden kedua dan mengemukakan laporannya, sesalinan yang mana hanya telah diberikan oleh peguamcara perayu kepada peguamcara responden-responden selepas beberapa bulan lewat di mana sebahagian

besarnya diselindungi. Mereka berpendapat responden-responden tidak berhak melihat keseluruhan laporan kerana ia melibatkan perkara-perkara yang melampaui 'the condition and prognosis of the second respondent'. Mahkamah Tinggi telah membenarkan permohonan repsonden-responden agar laporan itu diberikan kepada mereka sepenuhnya tanpa apa-apa diselindungkan. Dalam rayuan terhadap keputusan tersebut ke Mahkamah Rayuan, perayu berhujah bahawa dia berhak menutup beberapa bahagian laporan itu atas alasan hak keistimewaan oleh kerana ia disediakan bagi tujuan litigasi yang masih belum diselesaikan antara pihak-pihak.

Diputuskan, menolak rayuan dengan kos:

(1) Perayu diwajibkan, menurut perjanjiannya dengan responden-responden untuk menunjukkan laporan konsultan itu dalam keadaannya yang tidak ditutup. Dia diestopkan daripada enggan membuat pendedahan itu memandangkan dia, melalui peguamcaranya, telah bersetuju memberikan laporan itu tertakluk kepada dua syarat dan kedua-dua syarat itu telah dipenuhi oleh responden-responden (lihat perenggan 9).

(2) Sebagai balasan responden-responden membuat responden kedua sedia diperiksa oleh konsultan perayu, perayu telah bersetuju mengetepikan hak keistimewaan yang mana sebaliknya akan dinikmati olehnya berkaitan laporan itu. Jika perayu bimbang tentang risiko konsultan itu mengemukakan laporan yang melampaui mandatnya, dia patut meminta konsultan itu mengemukakan lebih daripada satu laporan (lihat perenggan 18).

(3) Oleh kerana konsultan itu hanya mengemukakan satu laporan, adalah munasabah untuk mahkamah, dan responden-repsonden, membuat kesimpulan bahawa ia hanya berhubung syarat dan prognosis responden kedua. Tiada afidavit daripada konsultan untuk mencadangkan sebaliknya; mahupun terdapat apa-apa dalam laporan itu yang mencadangkan bahagian-bahagian yang ditutup itu tiada kaitan dengan syarat dan prognosis responden kedua (lihat perenggan 8 & 18).

(4) Adalah munasabah untuk mahkamah membuat inferens bahawa meskipun laporan itu berkaitan perkara-perkara selain daripada syarat dan prognosis responden kedua, barangkali ia adalah kerana perkara-perkara sebegitu dianggap perlu untuk dimasukkan oleh konsultan (lihat perenggan 18).

(5) Mahkamah tidak boleh menerima bahawa konsultan yang diambil bekerja oleh perayu akan bertindak di luar jangkauannya untuk mengemukakan laporan melampaui mandatnya kecuali jika dia beranggapan bahawa laporan itu secara keseluruhan adalah perlu untuk

A mahkamah memahami syarat dan prognosis responden kedua dengan mengambilkira laporan itu telah disediakan semasa litigasi masih belum selesai lagi (lihat perenggan 18).]

Notes

B For cases on privilege, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2778–2780.

Cases referred to

GE Capital Corporate Finance Group Ltd v Bankers Trust Co and others [1995] C 1 WLR 172, CA (refd)

Great Atlantic Insurance Co v Home Insurance Co and others [1981] 2 All ER 485, CA (refd)

Legislation referred to

D Rules of the High Court 1980 O 24 r 30(1), O 34 r 7

Appeal from: Civil Suit No 22–515 of 2009 (High Court, Johor Bahru)

Christopher Foo (Lye Ca-Ryn with him) (Raja, Darryl & Loh) for the appellant.
R Jayabalan (N Jegatheesan with him) (John Ang & Jega) for the respondents.
E

Anantham Kasinather J (delivering judgment of the court):

BACKGROUND OF THE CASE

F

[1] This is an appeal from an order of the learned judicial commissioner Dato' Hue Siew Kheng ('JC') refusing to allow the appellant to cover up on the ground of privilege parts of a document. The document in question is a report produced by a medical consultant Dr Malinee Thambyayah, a consultant G pediatrician at the Pantai Medical Centre Kuala Lumpur ('the consultant report'). The appellant's claim privilege since the consultant report was prepared in respect of pending litigation between the parties.

[2] The pending litigation concerns the alleged failure of the appellant to H take proper care of the first respondent during her period of pregnancy. According to the respondents' pleaded case such failure on the part of the appellant caused her to lose one of the twins before childbirth and the birth of the second respondent in a deformed state.

I **[3]** The facts giving rise to this appeal arose in this manner. Following the filing by the respondents of the claim against the appellant for negligence, the solicitors for the appellant sought the consent of the first respondent to conduct a physical examination of the second respondent resulting in the consultant report.

[4] According to the letter of 7 January 2009 from the appellant's solicitors to the respondents' solicitors, this examination was 'for the purposes of assessing the 2nd Plaintiff's current condition and prognosis' (p 129 of *Jilid* 2 *Bahagian* B–C). The solicitors for the respondents in response intimated their client's agreement to such examination conditional on, inter alia, the solicitors for the appellant undertaking to furnish them with a copy of the consultant report. The solicitors for the appellant agreed to the conditions imposed by the respondents' solicitors vide their letter of 3 February 2009 subject to the solicitors for the respondent making available to them any specialist report produced at their instance.

[5] The evidence before the court is that following this agreement, Dr Malinee conducted her examination of the respondents sometime on 2/3 March 2009 and produced the consultant report. The appellant for reasons which were not evident then but which are evident now delayed making available the consultant report to the respondents' solicitors until early 2010. The appellant's solicitor was clearly agonising over whether to release the consultant report in full. Finally, the appellant's solicitor released the consultant report with substantial parts of the same covered up. The appellant's solicitor adopted the position that the respondents were not entitled to have sight of the whole report because they only agreed to provide a report in relation to 'the condition and prognosis of the 2nd Respondent'. Alleging that the consultant report included matters which went beyond the condition and prognosis of the second respondent, the appellant resisted the demand of the respondents' solicitors that they make discovery of the full report without any cover up. It is the submission of counsel for the appellant that the respondents' are only entitled to have sight of such parts of the consultant report which according to the index to the report relates to the condition and prognosis of the second plaintiff. It is not in dispute that Dr Malinee only produced one report following the examination of the respondents and this is the consultant report.

[6] The respondents then filed the summons in chambers for the production by the appellants of the consultant report in full. The learned JC agreed with the respondents and ordered the appellants to make available to the respondents the consultant report without any cover up. The appellants contended before us that the learned JC erroneously applied the 'what was the fair test' when the correct test is one of 'necessity' under O 24 r 30(1) of the RHC 1980. Counsel for the appellant also contended before us that the learned JC in Her Ladyship's judgment failed to follow the long followed practice in Common Law jurisdictions that parties are entitled to cover parts of the document that are privileged.

DECISION OF THE COURT

[7] As regards the first issue, in our opinion, the issue of discovery is a

non-issue on the facts of this case. We take this position because generally a party to litigation can refuse discovery of a document in his possession by reason of irrelevance or privilege. Neither can it be relied upon to refuse discovery when the party to the litigation agreed to make discovery pursuant to an agreement reached between the parties, as is the case here.

[8] In this case, the appellant agreed to provide discovery of the consultant report in consideration of the first respondent consenting to the second respondent being examined by their nominated consultant. Admittedly, according to the contents of the appellant's letter of 7 January 2009, the purpose of the examination was to enable the consultant to produce a report on the condition and prognosis of the second respondent. However, the fact of the matter is that, the consultant produced only one report following the examination of the second respondent. In such circumstances, in our judgment, it is reasonable for the court to conclude that as far as the consultant was concerned, the consultant report produced by her only dealt with the condition and prognosis of the second respondent. There is no affidavit from the consultant herself to suggest otherwise.

[9] Accordingly, in our opinion, irrespective of the scope of O 34 r 7 of the RHC, the appellant is obliged pursuant to the agreement concluded by it with the respondents to make discovery of the consultant report in its uncensored state. In our view, the appellant is, additionally, estopped from refusing to make discovery since they through their solicitors agreed to provide the consultant report subject to two conditions and both conditions have been complied with by the respondents.

[10] The second issue is whether the appellants can waive privilege over part of the consultant report and assert privilege over the remainder. We understand the submission of counsel for the appellant to be that this is an accepted practice in common law jurisdictions. In this respect, counsel submitted that to the extent Lord Templeman opined to the contrary in the case of *Great Atlantic Insurance Co v Home Insurance Co and others* [1981] 2 All ER 485, His Lordship is wrong.

[11] Counsel referred us to the pronouncements of LJ Hoffmann in the case of *GE Capital Corporate Finance Group Ltd v Bankers Trust Co and others* [1995] 1 WLR 172 (CA) for this powerful submission. LJ Hoffmann made two significant pronouncements in the case of GE Capital on the subject of the entitlement of a party to litigation to seal up or cover up parts of a document. The first principle of law enunciated by LJ Hoffmann dealt with the entitlement to cover up based on irrelevancy and the second on grounds of privilege.

[12] As regards the first principle of law, His Lordship said: A

> It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant. *Bray's Digest of the Law of Discovery*, (2nd Ed), (1910) at pp 55–56 puts the matter succinctly:
>
> > Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production; the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule the whole document and to seal up those parts which are sworn to be irrelevant … (paras B to D at p 174) B C

[13] On the second principle of law, His Lordship said:

> The test for whether part can be withheld on grounds of privilege is simply whether that part is privileged. There is no additional requirement that the part must deal with an entirely different subject matter from the rest (paras G to H at p 175). D

[14] In the course of elucidating the aforesaid two principles of law, LJ Hoffmann distinguished the ratio in the case of *Great Atlantic* in the following manner: E

> On its facts the Great Atlantic case was not about discovery at all. It concerned a privileged document of which counsel read out part in the course of his opening. It was held that, although he was unaware that the document was privileged, he thereby waived privilege in the whole. Templeman LJ said, at p 536: F
>
> > Severance would be possible if the memorandum dealt with entirely different subject matters or different incidents and could in effect be divided into two separate memoranda each dealing with a separate subject matter... Once it is decided that the memorandum deals with only one subject matter, it seems to me that it might be or appear dangerous or misleading to allow the Plaintiffs to disclose part of the memorandum and to assert privilege over the reminder. G

[15] Lord Justice Hoffmann opined that the severance test set out above was only valid if it was confined to cases where a party had already caused to be admitted a privileged document in evidence. His Lordship opined that in all other cases, the test to determine whether a party could cover up part of the document invoking privilege after having waived privilege to the reminder is this: H

> In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is privilege. There is no additional requirement that the part must deal with an entirely different subject matter from the rest (paras G to H at p 175). I

[16] LJ Hoffmann then sought to definitively state the law concerning the rights of a party waiving privilege to part of a document as regards the remaining parts of the document in the following terms:

> I admire the ingenuity but games like this should not be necessary. I think that Saville J was right in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (Note) No 2* [1992] 2 Lloyd's Rep 540 when he held that disclosure of the unprivileged part of a document was not a waiver of privilege for the rest, even though both dealt with the same subject matter; likewise Gatehouse J in *British and Commonwealth Holdings v Quadrex* (unreported), 4 July 1990 (paras F–G at p 176).

[17] We understand the submission of counsel for the appellant to be that a distinction ought to be drawn between discovery and admissibility. According to him, once this distinction is recognised it would be apparent that the ratio in *Great Atlantic* is not relevant to the facts of this case. The consultant report not having been admitted in evidence unlike in the case of *Great Atlantic*. For this reason, we were urged to follow the test propounded by LJ Hoffmann. According to learned counsel for the appellant, on an application of the test propounded by LJ Hoffmann to the facts of this case, the covered parts of the consultant report is clearly privileged notwithstanding that the consultant report concerns the same person and the subject matter of the whole report concerns this person and the waiver by the appellant of privilege to part of the consultant report.

[18] With respect, in our opinion, the outcome of this appeal is not to be determined by the application of either of the two different tests propounded in the cases of *Great Atlantic* and *GE Capital Corporate* but on the terms of the precise agreement reached between the parties as regards the disclosure of the consultant report. In our opinion, by the contents of the appellants' letter of 7 January 2009, the appellant undertook to make available the consultant report following the examination of the second respondent on the understanding that the consultant report would relate to the condition and prognosis of the second respondent. In other words, in consideration of the respondents making the second respondent available for examination by their nominated consultant, the appellants agreed to waive the privilege that they would have otherwise enjoyed as regards the consultant report. In our judgment, if the appellants feared the risk of the consultant producing a report which exceeded their mandate to limit the report to the condition and prognosis of the second respondent, they should have required the consultant to produce more than one report. Since the consultant report is the only report produced by the consultant following the examination of the second respondent and since it is reasonable for us to assume that the mandate that was furnished to the consultant was to produce a report on the condition and prognosis of the second respondent, it follows that the respondent is entitled to adopt the position that the consultant report only deals with the condition and

prognosis of the second respondent. As highlighted by the learned JC, there is nothing in the report to suggest that the covered parts do not relate to the condition and prognosis of the respondent only save on the basis of the index to the consultant report. With respect, to determine the contents of the consultant report based on its index is to give effect to form over substance, which is unacceptable on the facts of this case. First, the law is concerned with substance and not form. It cannot be right for the appellant to cover up parts of the consultant report which it expressly agreed would deal with the condition and prognosis of the first respondent. The fact of the matter is that the appellants agreed to provide a report dealing with the condition and prognosis of the second respondent and the consultant has produced only one report following the examination of the respondents dealing with the condition and prognosis of the second respondent. It sounds ill in the mouth of the appellant to now refuse to hand over the full consultant report purportedly because unknown to them, the consultant had prepared the report dealing with matters other than the condition and prognosis of the second respondent. Surely, it is for the consultant to assert to this effect and not for the appellant to say so. Accordingly, in the absence of a contrary assertion by the consultant who prepared the consultant report and there is none in this case, it is our considered view that the appellant cannot cover up part of the consultant report on grounds of privilege. Secondly, it is reasonable for us to infer that even if the consultant report did deal with matters other than the condition and prognosis of the second respondent, this was probably because such matters were considered necessary for inclusion by the consultant when dealing with the condition and prognosis of the respondent. In other words, the consultant report dealing with condition and prognosis only would not make sense unless the report included the other matters incorporated therein. In our view, this probably explains why the consultant report takes the form it does. We cannot accept that a consultant employed by the appellants themselves would go out of her way to produce a report beyond her mandate unless she considered the report as a whole to be necessary for the court to understand the condition and prognosis of the second respondent bearing in mind that the report was prepared when litigation was already pending.

[19] Accordingly, we agree with the decision of the judicial commissioner. Appeal dismissed with costs. appellant to pay costs of RM5,000 to the respondent. Deposit to the respondent towards account of fixed costs.

Appeal dismissed with costs.

Reported by Ashok Kumar